STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable L. Casey Manning, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 5448 (S.C. Ct. App. Filed 10/26/2016)

09-CP-40-00235

SHANNA KRANCHICK,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-191687

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shanna Kranchick, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-191687

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 5448
Heard February 10, 2015 – Filed October 26, 2016

REVERSED

Attorney General Alan McCrory Wilson and Assistant Attorney General Megan E. Harrigan, both of Columbia, for Petitioner.

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Respondent.

MCDONALD, J.: The State of South Carolina (the State) appeals the post-conviction relief (PCR) court's order granting Respondent Shanna M. Kranchick's application for PCR. The State argues the PCR court erred in determining that Kranchick's trial counsel provided ineffective assistance in failing to object to the State's forensic toxicologist's testimony as to the effects of the marijuana, antihistamines, and cough suppressant found in Kranchick's blood after the accident. We reverse and reinstate Respondent's conviction and sentence.

prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

I. Deficient Performance

At Kranchick's trial, forensic toxicologist Gregory Rock testified that he received a Bachelor of Science degree in medical technology from the University of South Carolina and additional training through the South Carolina Law Enforcement Division's (SLED's) toxicology program, "which consists of about a year-long training where [he] under[went] book work[,] oral testing[,] and written testing." Rock further testified that he worked as a forensic toxicologist at SLED for approximately two and one-half years following his training and that SLED is accredited by the American Society of Crime Lab Directors. Without objection, the trial court qualified Rock as an expert "in the field of forensic toxicology."

Rock did not testify as to his education, experience, or knowledge relating to the physical or mental effects of drugs on the human body, and trial counsel did not object when he subsequently testified as to the effects of the "significant amount of [marijuana] metabolite" and "very significant" amounts of cough suppressant and antihistamine found in Kranchick's blood following the accident.

At the PCR hearing, Strickler[3] testified that he "didn't hear anything in the testimony that qualified [Rock] in regard to the psychopharmacological effects of marijuana or the other [drugs] in this case." Thus, PCR counsel asserted trial counsel should have objected to Rock's testimony about the effects of the drugs on Kranchick as "outside the bounds of [Rock's] expertise." The State argued trial counsel was not deficient in failing to object because the definition of "toxicology" specifically "allows for the effects of drugs." *See Toxicology, Black's Law Dictionary* (5th ed. 1979) (defining "toxicology" as "[t]he science of poisons; that department of medical science which treats poisons, their effects, their recognition, their antidotes, and generally of the diagnosis and therapeutics of poisoning").

We find there is evidence in the record to support the PCR court's determination that "the State presented insufficient qualifications for the toxicologist to testify concerning the mental or physical effects of drugs on a person." *See State v. Priester*, 301 S.C. 165, 167, 391 S.E.2d 227, 228 (1990) (concluding the trial court

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[3] Trial counsel was not called to testify at the PCR hearing as she now lives out of state.

hours." Rock testified that although the metabolite itself does not impair a person's ability to drive, a person's ability to drive would be impaired by the amount of marijuana that must have been ingested to produce such a significant amount of metabolite. On cross-examination, Rock admitted his testing would have revealed the presence of THC—the primary mind-altering ingredient in marijuana—if the marijuana were still active in Kranchick's system. Rock also admitted that Kranchick could have ingested the marijuana nine to fourteen hours prior to the incident and up to twenty-four hours prior to the incident if she were a "chronic user" who smoked marijuana daily.

In addition to the marijuana metabolite, Rock found "very significant" amounts of cough suppressant and antihistamine in Kranchick's blood. Testing revealed 0.5 milligrams of antihistamine per liter of Kranchick's blood, 1.3 milligrams of methorphan (cough suppressant) per liter of blood, and 0.24 milligrams of methorphinan (cough suppressant) per liter of blood. Rock testified that when used for therapeutic reasons, cold medicine is "normally seen or taken at very low dosages, approximately anywhere from 0.01 to 0.05 [milligrams]." However, "[i]n this case, they were extremely high, almost twenty to thirty times that level." Rock explained that a person might take twenty to thirty doses of cold medicine accidentally or they may take it to get high. Rock further explained that the possible effects of cold medicine at these levels include euphoria, hallucinations, sedation, and muscle relaxation. With regard to the effects from the antihistamine alone, Rock stated, "You would tend to have possibly hallucinogenic effects. You would have a sedative effect. You would have a very [] muscle relaxing effect." Rock testified that ingesting twenty to thirty times the normal amount of either cough suppressant or antihistamine would impair a person's ability to drive.

Finally, Rock opined that the combination of marijuana and cold medicine in these amounts would "build on each other. They have what's called an additive effect." He testified that with such a combination of drugs "you're going to get, not necessarily twice the effect, but you have more effect [than] just one alone." Rock concluded that a person taking these drugs in these amounts could not safely operate an automobile, and that Kranchick "would have definitely been impaired." Trial counsel did not object to Rock's testimony as to the effects of marijuana combined with excessive doses of cold medicine.

In *State v. Martin*, which also involved a defendant convicted of felony DUI resulting in death, this court concluded the trial court did not err in allowing a forensic toxicologist to testify as to the effects of drugs and alcohol on the body. 391 S.C. 508, 512–13, 706 S.E.2d 40, 42 (Ct. App. 2011). Specifically, forensic

court disagreed, finding the trial court did not abuse its discretion in permitting Landrum to so testify. *Id.* at 514–15, 706 S.E.2d at 43. Specifically, the *Martin* court relied upon the witness's testimony as to his education and experience, as well as his explanation that a forensic toxicologist tests samples for the presence of alcohol and drugs and then interprets the findings to determine an individual's degree of impairment. *Id.* at 515, 706 S.E.2d at 43. The court further noted the defendant's objections to the toxicologist's qualifications went to the weight of his testimony and not its admissibility. *Id.* at 515–16, 706 S.E.2d at 43–44. Finally, the court held that even if the trial court erred in permitting the testimony about the effects of the drugs and alcohol upon the driver, the defendant was not prejudiced because the State was entitled to an inference that the defendant was under the influence of alcohol as his BAC was 0.167 percent. *Id.* at 515, 706 S.E.2d at 43 (citing S.C. Code Ann. § 56-5-2950(G)(3) (Supp. 2012), which provides that in a prosecution for felony DUI, a BAC of greater than .08 percent gives rise to an inference that the defendant was under the influence of alcohol).

Likewise, in *State v. White*, this court found the circuit court did not err in allowing a "state forensic toxicologist" to give an opinion "concerning the rate at which a 150-pound man would eliminate alcohol and in allowing him to testify as to the effects of benzodiazepine when used in combination with alcohol." 311 S.C. 289, 295, 428 S.E.2d 740, 743 (Ct. App. 1993). There, the defendant contended the testimony was improper because the witness "admitted that different 'benzos' have different effects and he did not know which benzodiazepine White had taken." *Id.* This court disagreed, determining that defendant's objections to the toxicologist's testimony went to the weight of the evidence and not its admissibility. *Id.* at 295, 428 S.E.2d at 743 (explaining that once a witness is qualified as an expert, any question regarding the adequacy of the expert's knowledge goes to the weight of the testimony and not to its admissibility (citing *State v. Nathari*, 303 S.C. 188, 195, 399 S.E.2d 597, 602 (Ct. App. 1990))).

Although not specifically presented, Rock's education and experience are equivalent to the qualifications of the *Martin* forensic toxicologist. Here, the PCR court found, and Kranchick conceded, that "[Rock] was sufficiently qualified to testify regarding general toxicology as [a] 'person or scientist who analyzes biological specimens for the presence of absence of alcohol, drugs or other poisons that may be present.'" Thus, it is likely that objections to Rock's further testimony concerning the effects of the drugs would have been futile because the objections would have addressed the weight of the evidence, rather than its admissibility.

Other witnesses testified as to the erratic movement of the Taurus prior to the accident. Daniel Sharp, the injured passenger in decedent Croft's truck, first saw the Kranchick vehicle in the far left lane, in the gravel between the median and the roadway. Because the bobtail had a number of rearview mirrors, Sharp could see that the Taurus behind the truck was "losing it." Tracy Proctor, who witnessed the accident, also observed "a car completely out of control."

Sergeant Robert Lee of the South Carolina Highway Patrol's Multi-Disciplinary Accident Investigation Team (MAIT Unit) testified that no environmental factors contributed to the crash. Lee further testified that there was no indication of braking by Kranchick's vehicle until its yaw marks began in the area of the rumble strip next to the median.[5] According to Sergeant James Day, another accident reconstructionist with the MAIT Unit, Kranchick "went so far over that she lost control of her vehicle at the rumble strip and she over-corrected, causing it to go out of control."

In light of the overwhelming evidence that Kranchick was impaired at the time of the accident, we do not believe trial counsel's failure to object to Rock's testimony prejudiced the outcome of her case. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."); *Huggler v. State*, 360 S.C. 627, 634–35, 602 S.E.2d 753, 757 (2004) ("[G]iven the witnesses' testimonies on direct provided overwhelming evidence that sexual abuse did in fact occur, counsel's failure to object to the admission of the written statements did not prejudice the outcome of Respondent's case."); *State v. Goode*, 305 S.C. 176, 179–80, 406 S.E.2d 391, 393–94 (Ct. App. 1991) (holding evidence supported a finding that defendant was under the influence of alcohol at the time of an accident despite the lack of evidence concerning the defendant's BAC, where the road was straight with clear visibility, the defendant had a strong odor of alcohol on his breath, alcohol was found in his blood, and there was expert

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[5] A rumble strip is the strip that alerts a driver when he or she begins to run off the road. A yaw mark is made by an out-of-control vehicle when the rear tire out-tracks the front tire. Here, the yaw marks started at the rumble strip and headed back to the center of the roadway. A yaw cannot occur in a braking situation. There were no skid marks at the scene to indicate emergency braking by Kranchick's vehicle prior to the accident.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

SHANNA KRANCHICK,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-191687

Appeal from Richland County

Honorable L. Casey Manning, Circuit Court Judge

Opinion No. 5448

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Shanna Kranchick petitions the Court for rehearing. Counsel respectfully submits that in finding that Petitioner suffered no prejudice from trial counsel's deficient performance in failing to object when the forensic toxicologist, Gregory L. Rock, testified beyond the scope of his expert qualification, this Court misapprehended the deferential any evidence standard of review that this Court must apply to both the finding of deficient performance and the finding of prejudice by the PCR court.

First, this Court correctly affirmed the PCR court's holding that trial counsel's failure to object to the testimony exceeding the toxicologist's "presented" qualifications fell below an

objective standard of reasonableness. As to prejudice, however, this Court wrote, "Although not specifically presented, Rock's education and experience are equivalent to the qualifications of the Martin forensic toxicologist." In State v. Martin, 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011), the forensic toxicologist explained the extent of his training and education regarding the effects of alcohol and drugs on the body. Based on Martin this Court wrote, "Thus, it is likely that objections to Rock's further testimony concerning effects of the drugs would have been futile because the objections would have addressed the weight of the evidence, rather than its admissibility."

This Court's finding that any objection to Rock's effect testimony would have been futile because it goes to weight and not admissibility erroneously assumes the State would have been able to establish that Rock was qualified to testify as to effects. Rock's effects testimony was inadmissible because, as this Court correctly found, the testimony exceeded the scope of his expert qualification. This Court's reliance on Martin is misplaced because at trial the State in the present case failed to establish that Rock was qualified to testify as to the effect of marijuana and cough medicine on the body. In the present case there was no testimony regarding Rock's training and education regarding the effects of marijuana and cold medicine on the body. Unlike the forensic toxicologist in Martin, Rock was only qualified to testify about the presence or absence of substances, not the effects. At trial he testified that, "A forensic toxicologist is a person or scientist who analyzes biological specimens for the presence or absence of alcohol, drugs or other poisons that may be present." (App. p. 250, lines 9-11).

Counsel respectfully submits that this Court's reliance on State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct.App. 1993), is misplaced because the toxicologist in White was qualified to testify as to effects and the objection went to the fact that the toxicologist did not know which benzodiazepine White had taken. This Court in White found that the objection went to the

weight and not the admissibility of the testimony. In contrast, in the present case, Rock was not qualified to testify as to the effects of marijuana and cold medicine. Trial counsel should have objected when Rock's testimony exceeded the scope of his qualification.

In the order granting relief the PCR judge wrote, "The toxicologist did not testify as to any education, experience, or knowledge related to the physical or mental effects of drugs on the human body. **Based on the record, the State presented insufficient qualifications for the toxicologist to testify concerning the mental or physical effects of drugs upon a person."** (App. pp 808-809) (emphasis in original). Counsel respectfully submits that this Court should have deferred to the finding of the PCR court rather than speculating about Rock's qualifications.

In conclusion this Court wrote, "Because we find Rock's qualifications are equivalent to those of the forensic toxicologist in State v. Martin supra, his testimony regarding the effects of marijuana metabolite and cold medicine would have been appropriate and within the scope of his expertise. Therefore, we hold the PCR court erred in determining that "but for counsel's unprofessional errors,". the result of Kranchick's trial would have been different." As discussed above, the record in the present case is devoid of any evidence or testimony that Rock was qualified to testify about the effects of marijuana and cold medicine. Rather than deferring to the finding of prejudice by the PCR court, this Court speculated, without any basis in the record, that Rock had the equivalent qualification as the forensic toxicologist in Martin. The mere fact that two witnesses in separate cases shared the title of "forensic toxicologist" is not sufficient to assume that they had equivalent qualifications in regard to effects testimony. There is no evidence in the record to support the assumption that Rock would have been found qualified to testify about the effects of cold medicine and marijuana had trial counsel objected. Because the State failed to establish that Rock was qualified to testify in regard to the effects of marijuana and cold medicine, Rock's

qualification was the same as the lab technologist in State v. Preister, 301 S.C. 165, 391 S.E.2d 227 (1990), who admitted that he had no training in determining the effect of alcohol on the human system. In Priester the South Carolina Supreme Court found the technologist was not qualified to testify as to intoxication and the admission of his testimony constituted reversible error in that felony DUI case. This Court should find, as the PCR court found, that Rock was not qualified to testify as to the effects of marijuana and cold medicine and that trial counsel's failure to object prejudiced Petitioner.

Another important distinction between the present case and Martin is the fact that in Martin the State was entitled to an inference that Martin was under the influence of alcohol, making any error in admitting effects testimony harmless. "Finally, even if the trial court erred in allowing Landrum's testimony regarding the effects of drugs and alcohol, Martin was not prejudiced. The State was entitled to an inference Martin was under the influence of alcohol because his BAC was 0.167 percent. *See* S.C.Code Ann. § 56–5–2950(G)(3) (Supp.2009) (providing that in a criminal prosecution for felony DUI, a blood alcohol concentration of greater than 0.08 gives rise to an inference the defendant was under the influence of alcohol)." State v. Martin, 391 S.C. 508, 515, 706 S.E.2d 40, 43 (Ct. App. 2011). In the present trial counsel was ineffective in failing to object to Rock's effects testimony that exceeded the scope of his expert qualification. The error was not harmless as the State was not entitled to the blood alcohol inference in Martin. Kranchick tested negative for alcohol. (App. p. 257, line 21).

Second, this Court found there was no prejudice based on other evidence of impairment. This Court wrote, "Moreover, even if trial counsel had successfully objected, thus limiting Rock's testimony to the mere presence of the drugs found in the blood testing, Kranchick cannot establish the probability of a different result at trial." Counsel respectfully submits that this

Court overlooked the strength of Rock's improper effects testimony. In the order granting relief the PCR judge wrote:

> Where there is limited admissible evidence on an element the State must prove, the failure of defense counsel to object to inadmissible evidence on that element is ineffective assistance of counsel. See Huggler v. State, 360 S.C. 627, 634-635, 602 S.E.2d 753, 757 (2004). To prevail on a claim for felony driving under the influence, one element the State must prove is that a defendant drove a vehicle while under the influence of alcohol or drugs. S.C. Code §56-5-2945 (2009). The State may prove this element by presenting evidence such that a reasonable jury could conclude that a defendant was intoxicated. In this case the State relied heavily on expert testimony that a defendant was intoxicated or would be intoxicated after ingesting a certain amount of alcohol or drugs. Therefore, Applicant has shown the prejudice necessary to establish ineffective assistance of counsel.

(App. pp. 809-810). The PCR judge's finding of prejudice is wholly supported by the record.

The only effects evidence presented by the State was Rock's improper testimony. Rock testified that he tested urine and blood samples from Kranchick and detected the presence of marijuana metabolite, antihistamines and cough suppressant. (App. pp. 257-260). The State then asked and the toxicologist testified about the effects the ingestion of marijuana and cold medicine would have upon a person. (App. pp. 267-270). The toxicologist testified that the amount of marijuana detected would impair someone's ability to drive. (App. p. 265, lines 9-20). In regard to the antihistamine the toxicologist testified, "You would tend to have possibly hallucinogenic effects. You would have a sedative effect. You would have a very, muscle relaxing effect. Just a wide range of effects." (App. p. 267, lines 21-24). The toxicologist testified that the antihistamine detected would have impaired anybody's ability to drive. (App. p. 268, lines 10-13). The toxicologist gave similar testimony in regard to the cough suppressant. (App. p. 268, lines 18- p. 269, 270, lines 1-8). Finally, in regard to the combination of substances, the toxicologist testified, "Yes, she would have definitely been impaired." (App. p. 270, line 23). The State relied on the improper testimony in closing argument stating, "And I asked him [Rock] over and over again,

and there's no dispute about this. Was her ability to drive have been impaired. Yes." (App. p. 617, lines 9-12). The State relied heavily on Rock's improper testimony to prove impairment, an element of felony DUI.

Counsel respectfully submits that while the other evidence of impairment presented by the State was sufficient to survive a directed verdict motion and submit the case to the jury, the other evidence was not overwhelming. The toxicologist testified about detecting the presence of marijuana metabolite and cold medicine but admitted that the marijuana could have been smoked up to 24 hours prior to testing. (App. p. 277, lines 11-21). S.C. Highway Patrol Officer Baker testified that based on his observations of Kranchick, he believed she was under the influence. (App. p. 177, lines 18 – p. 178, lines 1-6; p. 196, lines 18-20). The State's evidence, however, does not constitute overwhelming evidence rendering counsel's failure to object to the toxicologist's improper testimony non-prejudicial. The toxicologist's effects testimony was critical and Respondent was prejudiced by trial counsel's failure to object to the improper testimony. There is a reasonable probability that, but for counsel's failure to object to Rock's improper testimony, the result of the proceeding would have been different. For these reasons, counsel respectfully requests rehearing to affirm the finding of the PCR court.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

This 9th day of November, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable L. Casey Manning, Circuit Court Judge

SHANNA KRANCHICK,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Shanna Kranchick, #283147, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 9th day of November, 2016.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 9th day of November, 2016.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026

The South Carolina Court of Appeals

Shanna Kranchick, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-191687

ORDER

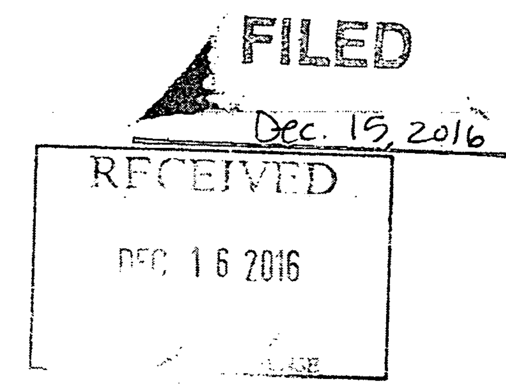
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C. J.

J.

J.

Columbia, South Carolina



cc:
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The Honorable L. Casey Manning